No. 12490

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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FRANCES LEON PARRISH,

*Appellant,*

*vs.*

ACACIA MUTUAL LIFE INSURANCE COMPANY, a corporation, *et al.* (Does),

*Appellee.*

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## APPELLEE'S BRIEF.

**Upon Appeal From the District Court of the United States for the Southern District of California, Central Division**

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### Jurisdictional Statement.

This is an appeal by Frances Leon Parrish, plaintiff, from a final judgment against her in the District Court of the United States, Southern District of California, Central Division, entered January 18, 1950. Final judgment came upon defendant's motion to set aside verdict and for judgment in accordance with defendant's motion for a directed verdict and, in the alternative, for a new trial. Notice of Appeal was filed on January 24, 1950. [Tr. I, pp. 32-59.] Jurisdiction of the within appeal therefore exists in this Court under and by virtue of the provisions of Title 28, *United States Code,* Sections 1291 and 2107.

The within action was instituted by plaintiff in the Superior Court of the State of California in and for the County of Los Angeles. In her complaint plaintiff sought to recover the principal amount of ten thousand dollars ($10,000.00) as beneficiary under a policy of insurance issued by defendant to her husband, Thomas Harry Parrish. It appearing from defendant's verified petition for removal of civil action that plaintiff was and is a citizen and resident of the State of California and that defendant was and is a corporation organized and existing under and by virtue of a charter granted to said defendant by the Congress of the United States, with its principal place of business in the City of Washington, District of Columbia, the action was removed to the District Court of the United States, Southern District of California, Central Division. [Tr. I, pp. 2-11.] Jurisdiction of the within action therefore existed in the District Court under and by virtue of the provisions of Title 28, United States Code, Section 1332(a)(1), 1332(b), 1441(a) and 1446(e).

## Statement of the Case.

On October 4, 1946, Thomas Harry Parrish (hereinafter referred to as Mr. Parrish) completed and executed Part I of an application in writing to the Acacia Mutual Life Insurance Company (hereinafter referred to as Acacia Mutual) for issuance to him of a Ten-year Term policy of insurance upon his life, said policy to be in the face amount of ten thousand dollars ($10,000.00) and to name as beneficiary Frances Leon Parrish, wife (hereinafter referred to as appellant). Thereafter, on October 17, 1946, Mr. Parrish completed and executed Part II of his application entitled "Answers Made to Medical Examiner in Conjunction with and Forming Part of Application for Insurance." [Defendant's Exhibits A and B.]

On October 25, 1946, Acacia Mutual executed and issued the policy applied for and on November 6, 1946, delivered the policy to Mr. Parrish, delivery being conditioned on the agreements contained in the Certificate of Continued Health and Contract Acceptance executed by Mr. Parrish at the time of delivery. [Defendant's Exhibit E.]

On February 8, 1948, Mr. Parrish died in Alhambra, California, from a heart condition the exact nature of which was not disclosed. Appellant provided due proof of death to Acacia Mutual and demanded payment of ten thousand dollars ($10,000.00). After investigation, Acacia Mutual denied liability and refused to pay appellant the amount demanded or any amount other than a return of all premiums, taking the position that the policy of insurance issued and delivered by it was void from its inception and never had been of any force or effect as a contract of insurance because (a) its *issuance* had been induced by reliance upon Mr. Parrish's written application therefor, and in his application Mr. Parrish had misrepresented and concealed material facts which were within his knowledge concerning his prior medical history, symptoms, consultations with and treatment by physicians, despite specific inquiry as to such history, symptoms, consultations and treatments in said application; and (b) *delivery* of the contract had been induced by further misrepresentations and concealments of material facts with respect to his health and consultations with and treatment by physicians and surgeons during the period from the date of application to the date of delivery and, as a result, the conditions precedent to delivery contained in the Certificate of Continued Health and Contract Acceptance executed by Mr. Parrish on the date of delivery of the policy of insurance

had not been met and the consideration for the policy of insurance had failed.

After refusal of Acacia Mutual's tender of premiums received, appellant instituted this action and the matter ultimately came to trial before a jury in the District Court of the United States, Southern District of California, Central Division. Both plaintiff and defendant moved for a directed verdict at the close of the evidence and both motions were denied by the trial court. [Tr. II, pp. 230-234.] The jury returned a verdict for appellant and judgment was entered thereon. [Tr. I, pp. 29-31.] Acacia Mutual then moved to set aside the verdict and for judgment in accordance with its motion for directed verdict and, in the alternative, for a new trial. This motion was granted, judgment entered and the within appeal taken. [Tr. I, pp. 32-59.]

Acacia Mutual's rejection of appellant's demand, defense of this action, motion for directed verdict and motion to set aside verdict all are, either directly or indirectly, related to (a) the questions propounded to Mr. Parrish and the answers thereto made by Mr. Parrish in his written application for insurance, and (b) the agreements made by Mr. Parrish in the Certificate of Continued Health and Contract Acceptance at the time of delivery of the policy. It is, therefore, essential to a clear statement of this case to consider the medical history of Mr. Parrish not in the generalized fashion used in appellant's statement of the case but with particular reference to the direct and specific questions asked and the specific agreements signed—for it was under those circumstances that Mr. Parrish answered the questions and induced Acacia Mutual to issue the policy here sued upon.

## The Application and the Misrepresentations and Concealments Therein.

The pertinent questions and answers contained in the application are:

"8. Have you ever had or been under treatment, observation, or diagnostic study by a physician, specialist, or other practitioner for any of the following? (These questions must be asked and answered with careful deliberation and consideration.) For each affirmative answer underline ailment and specify particulars in No. 12.

a. Heart disease or disorder of any kind, or symptom thereof such as heart weakness or pain, angina, palpitation, shortness of breath, dizziness, fainting spells, dropsy, disease of arteries, elevated blood pressure, varicose veins, etc. NO

b. Tuberculosis of lung or any other organ, or disease or disorder of lung or respiratory organs, such as spitting or raising of blood, prolonged or frequent cough or hoarseness, bronchitis, pleurisy, *pneumonia,* asthma, sinus trouble, etc. YES

c. Disease or disorder of stomach, intestines, any abdominal organ, duodenum or bowels; such as, gastric or duodenal ulcer, jaundice, gallstones, gallbladder disease, liver disease, appendicitis, dysentery, diarrhea, fistula, piles, rectal disease, rupture, indigestion, abdominal pains, etc. NO

9. When did you last consult a physician, specialist, or other practitioner? 1940

Give name and address of the one consulted and full particulars under 12. Dr. Wolf

10. Have you had any ailments, injuries, or diseases not stated above? If so, give full particulars under 12. NO

12. State below the particulars of ALL diseases, injuries, ailments, or surgical operations which you have had or for which you have been under treatment, observation, or diagnostic study. Also give full particulars requested in questions 8, 9, 10 and 11 above.

| Disease, Injury, Ailment or Surgical Operation | Date | No. of Attacks | Duration | Severity | Any remaining effects | Give names and addresses of attending physicians, specialists or practitioners consulted |
|---|---|---|---|---|---|---|
| Pneumonia | 1905 | 1 | 2 weeks | mild | No | Don't remember |
| Acute cold | 1940 | 1 | 1 week | mild | No | Dr. Wolf<br>Ross-Loos<br>Clinic, Los<br>Angeles, Cal. |

| 13. Have you consulted a physician, specialist, or other practitioner not stated above? Give name and address for each one consulted, date of consultation and particulars. | Name | Address | Date of consultation and particulars |
|---|---|---|---|
| | NO | | |

[Defendant's Exhibit B.]

Part II of the application for insurance also contained, above Mr. Parrish's signature, the following certification:

"It is hereby certified by the undersigned that the answers and statements made above are correctly and fully stated; that no material circumstance or information has been withheld or omitted concerning the past and present state of health, habits and occupation of proposed insured; and it is agreed that the above statements and answers shall be considered a basis for any policy that may be issued on the life of the proposed insured. If such statements and answers are submitted in connection with an application for re-

instatement of insurance, it is agreed that the company shall rely thereon in acting upon such application.

Signature of
Proposed insured T. H. Parrish."

[Defendant's Exhibit B.]

Part I of the application for insurance contained, above Mr. Parrish's signature, the following agreements:

"It is hereby agreed as follows: (a) that unless otherwise indicated, all questions in Parts I and II of this application have reference to the proposed insured; (b) that all statements contained in Parts I and II hereof are full, complete and true and are offered to the Company as a consideration for any contract of insurance that may be issued in pursuance thereof; (c) that no agent shall have the right to make, alter, modify or discharge any contract issued on this application, or extend the time for payment of any premium due under such contract; (d) that notice to or knowledge of the soliciting agent or medical examiner is not notice to or knowledge of the Company, and that neither one of them is authorized to accept risks or to pass upon insurability; (e) that there shall be no contract of insurance until the policy shall have been issued by the Company and delivered by a duly authorized agent of the Company and the first premium paid thereon, all during the proposed insured's life and continuance in good health, provided, however, that if the first premium is tendered and a receipt issued on the attached binding

receipt form, the insurance shall take effect in accordance with the conditions of said binding receipt.

Dated at Compton, Calif.
this 4 day of October, 1946

Signature of
Proposed Insured Thomas Harry Parrish."

[Defendant's Exhibit A.]

At the trial it was established from uncontradicted evidence that the statements and representations contained in the answers of Mr. Parrish to questions 8, 9, 10, 12 and 13, as set forth above, were false and untrue and not fully and correctly stated in that, during the period from July 31, 1942, to the date of his application, he had had and had consulted and been under treatment, observation or diagnostic study by physicians or specialists on at least seventeen (17) separate occasions for one or another of the specific diseases, disorders or symptoms referred to in his application. The particular statements and representations together with the falsity and untruths therein which also constitute concealments are as follows:

1. *Representation:* That he had never had or been under treatment, observation, or diagnostic study by a physician, specialist or other practitioner for heart disease or disorder of any kind, or symptoms thereof such as heart weakness or pain, angina, palpitation, shortness of breath, dizziness, fainting spells, dropsy, disease of arteries, elevated blood pressure, varicose veins, etc. [Defendant's Exhibit B, question 8a and answer.]

*False* because he had had and had consulted and been under treatment, observation or diagnostic study for heart disease or disorder or one of the listed symptoms thereof by Dr. John C. Murrin on September 29, 1942, October 4, 1943, October 5, 1943, and August 22, 1945. [Defendant's Exhibit D; Tr. II, pp. 54-55, 58-68, 60, 62-67.]

2. *Representation:* That he had never had or been under treatment, observation or diagnostic study by a physician, specialist or other practitioner for tuberculosis of lung or any other organ, or disease or disorder of lung or respiratory organs such as spitting or raising of blood, prolonged or frequent cough or hoarseness, bronchitis, pleurisy, pneumonia, asthma, sinus trouble, etc., other than a mild attack of pneumonia in 1905. [Defendant's Exhibit B, question 8b and answer.]

*False* because he had had and had consulted and been under treatment, observation or diagnostic study for disease or disorder of the lungs or respiratory organs such as prolonged or frequent cough and bronchitis by Dr. Murrin on December 3, 1942, December 24, 1942, and September 8, 1943, by Dr. Leon Wolff on October 4, 1945, and November 27, 1945, and by Dr. Peter Hershey on September 5, 1946. [Defendant's Exhibit D; Tr. II, pp. 55-58, 114-115.]

3. *Representation:* That he had never had or been under treatment, observation, or diagnostic study by a physician, specialist or other practitioner for disease or disorder of stomach, intestines, any abdominal organ,

duodenum or bowels; such as gastric or duodenal ulcer, jaundice, gallstones, gallbladder disease, liver disease, appendicitis, dysentery, diarrhea, fistula, piles, rectal disease, rupture, indigestion, abdominal pains, etc. [Defendant's Exhibit B, question 8c and answer.]

*False* because he had had and had consulted and been under treatment, observation or diagnostic study for disease or disorder of stomach, intestines, an abdominal organ, duodenum or bowels, such as appendicitis, dysentery, diarrhea, indigestion, abdominal pains, etc., by Dr. Murrin on July 31, 1942, August 4, 1942, and August 22, 1945, Dr. Wolf on October 11, 1944, and December 18, 1944, and Dr. Louis Baltimore on December 21, 1944, Dr. Peter Hershey on October 30, 1946, and Dr. John H. Lloyd on November 4, 1946. [Defendant's Exhibit D, Tr. II, pp. 51-52, 52-54, 112-113, 102-106, 62, 31-32.]

4. *Representation:* That he had not consulted a physician, specialist or other practitioner since consulting a Dr. Wolf in 1940. [Defendant's Exhibit B, question 9 and answer.]

*False* because he had consulted at least five (5) physicians more than seventeen (17) times since consulting Dr. Wolf in 1940. [Defendant's Exhibit D.]

5. *Representation:* That he had not had any ailments, injuries or diseases other than those stated in said written application. [Defendant's Exhibit B, question 10 and answer.]

*False* because he had had ailments or diseases other than those stated in said written application on at least seventeen (17) occasions during the period 1942-1946. [Defendant's Exhibit D.]

6. *Representation:* That he had stated the particulars of all diseases, injuries, ailments or surgical operations which he had or for which he had been under treatment, observation or diagnostic study. [Defendant's Exhibit B, question 12 and answer.]

*False* because he had not stated the particulars of all diseases or ailments which he had had or for which he had been under treatment, observation or diagnostic study. [Defendant's Exhibit D.]

7. *Representation:* That he had not consulted any physician, specialist or other practitioner other than as stated in said application. [Defendant's Exhibit B, question 13 and answer.]

*False* because he had consulted at least five (5) physicians more than seventeen (17) times since consulting Dr. Wolf in 1940. [Defendant's Exhibit D.]

8. *Representation:* That the answers and statements made in the application were full, complete and true and correctly and fully stated. [Defendant's Exhibits A and B.]

*False* because the answers and statements made in the application were not full, complete and true and correctly and fully stated. [Defendant's Exhibit D.]

## The Certificate of Continued Health and Contract Acceptance.

In addition to his application and pursuant to the agreement therein "that there shall be no contract of insurance until the policy shall have been issued by the Company and delivered by a duly authorized agent of the Company and the first premium paid thereon, all during the proposed insured's life and continuance in good health," Mr. Parrish, on November 6, 1946, the date of delivery of the policy sued upon, executed a Certificate of Continued Health and Contract Acceptance which reads as follows:

> "Certificate of Continued Health and Contract Acceptance.
>
> This will acknowledge delivery of Policy No. 648389, such delivery being based upon the following agreements: (1) that said insurance contract is accepted in the form and for the amount issued; (2) that the first premium on said insurance contract was tendered to the company during the continuance of good health of the proposed insured; and (3) that prior to the date said premium was tendered proposed insured, except as stated in the application for said insurance contract, had not been sick and had not consulted or been treated or attended by a physician.
>
> The first premium was tendered on the 6th day of Nov. 1946.
>
> Dated at Compton, Calif. this 6 day of Nov., 1946 — THOMAS H. PARRISH, Signature of Insured."
>
> [Defendant's Exhibit E.]

By his execution of this certificate Mr. Parrish stated and represented to Acacia Mutual (a) that prior to November 6, 1946, and except as stated in his application, he

had not been sick and had not consulted or been treated or attended by a physician and (b) that there had been no material change in his health during the period from the date of the application to the time of delivery of the policy.

It was established from uncontradicted evidence that, on October 30, 1946, a house call was made by Dr. Peter Hershey (the so-called "undisclosed" doctor referred to in Appellant's Brief [Cf. Defendant's Exhibit D]) at the home of Mr. Parrish; that on that date Mr. Parrish complained, among other things, of "aching in the stomach for four days"; that an examination was made; that there was tenderness to touch in the epigastrium and the abdominal walls were soft; that there was a tentative diagnosis made, tincture of belladonna was prescribed, and a complete blood study ordered; that a complete blood study was made which revealed, among other things, a white blood count of 19,900; that this white blood count was elevated to nearly twice the normal range of 6,000 to 10,000; that such a white blood count indicated a *severe infection* and was *definitely serious;* that he was referred to the surgery department of the Clinic in Los Angeles; that on November 4, 1946, he consulted Dr. Lloyd of the surgery department in Los Angeles; that at this time the pain was almost gone and there was tenderness only to deep pressure; that a diagnosis of acute appendix, now subsiding, was made and a soft diet prescribed; and that removal of the appendix was advised if there was any recurrence of the condition for which he had consulted these doctors. [Defendant's Exhibit D; Tr. II, p. 29, line 1, to p. 45, line 20; p. 93, line 3, to p. 95, line 17; p. 99, lines 21-23.]

Five days later Mr. Parrish signed the Certificate of Continued Health and Contract Acceptance above noted

and thus represented that, except as stated in his application, (1) he had not been sick and (2) had not consulted or been treated or attended by a physician. Concealed were the facts that there had been a material change in his health during the period from the date of application to the date of delivery and that he had consulted and been treated by two doctors for a serious and severe infection diagnosed by one of the doctors at least as an acute appendix. The evidence is undisputed that the policy would have been recalled had these facts been made known to Acacia Mutual [Tr. II, p. 162, line 14, to p. 164, line 10] and that the policy would not have been delivered if these facts had been made known to Acacia Mutual or to the delivering agent [Tr. II, p. 198, line 14, to p. 199, line 3], continuance in good health and full information with respect to all illnesses and all consultations with or treatments or attendances by physicians to the date of delivery of the policy being strict conditions precedent to such delivery.

## Statement of Issues.

The questions involved in this appeal are:

1. Did the District Court err in granting defendant's motion to set aside verdict and for judgment?

2. Did the District Court err in denying plaintiff's motion for directed verdict?

3. Did the District Court err in granting defendant's motion for a new trial in the alternative?

## Summary of Argument.

### I.

The District Court did not err in granting defendant's motion to set aside verdict and for judgment. Under California law, the applicable law in this case, a false representation or a concealment of fact in an application for life insurance which is material to the risk insured against and which is relied upon by the other contracting party vitiates the contract irrespective of whether the false representation or concealment was intentional or unintentional. There is no question but that Mr. Parrish, the decedent insured, executed the application and did so as the basis and consideration for the insurance contract. Similarly there is no question but that the application contained misrepresentations and concealments of fact, particularly with respect to diseases or disorders of the heart or symptoms thereof, diseases or disorders of the lungs or respiratory organs and of the stomach or abdominal organs, and with respect to consultations with and treatments by physicians for such ailments.

These misrepresentations and concealments were material to the risk as a matter of law, and the evidence is uncontradicted that Acacia Mutual relied on them in issuing the policy of insurance.

Therefore Acacia Mutual completely established its defense and was entitled to judgment notwithstanding the verdict.

The same rules of law apply with respect to misrepresentations or concealments of material facts with respect to change in health or with respect to information sought in the application and coming to the attention of the applicant prior to delivery of the contract. Acacia Mutual

further established a complete defense by the uncontradicted evidence of material misrepresentations and concealments made by the applicant, Mr. Parrish, after the application and prior to delivery. The propriety of the District Court's order in granting defendant's motion to set aside verdict and for judgment is supported by these material misrepresentations and concealments made in the Certificate of Continued Health and Contract Acceptance, as well as by the ones made in the application.

II.

The District Court did not err in denying plaintiff's motion for directed verdict. Although plaintiff made out a *prima facie* case, nevertheless under the applicable California law this is insufficient to support a directed verdict for plaintiff in view of the fact that Acacia Mutual established its defense by the uncontradicted evidence and proved conclusively that Mr. Parrish, the applicant, misrepresented and concealed material facts within his knowledge which if known to Acacia Mutual would have caused it to refuse to issue or deliver the policy of insurance.

III.

The District Court did not err in granting defendant's motion for a new trial in the alternative and its order in this regard is not reviewable. The determination of whether a new trial should be granted calls for the judgment in the first instance of the trial judge who saw and heard the witnesses. Inasmuch as the verdict was contrary to the clear weight of the evidence, it is within the trial court's discretion to grant the new trial. Moreover, an order granting a new trial is interlocutory and not reviewable. Finally, the evidence was clearly insufficient to support a verdict for plaintiff. Therefore the granting of a new trial in the alternative was proper.

## ARGUMENT.

### I.

### The District Court Did Not Err in Granting Defendant's Motion to Set Aside Verdict and for Judgment.

**A. Under California Law, a False Representation or a Concealment of Fact in an Application for Insurance Which Is Material to the Risk Insured Against and Which Is Relied Upon by the Other Contracting Party Vitiates the Contract Irrespective of Whether the False Representation or Concealment Was Intentional or Unintentional.**

Since the alleged contract of insurance here sued upon was applied for and delivered in California, the substantive law of California controls the issues on this appeal.

Title 28, *United States Code,* Sec. 1335;

*Erie Railroad Company v. Tompkins* (1938), 304 U. S. 64;

*Gates v. General Casualty Company of America* (C. C. A. 9th, 1941), 120 F. 2d 925, 926, 927.

It is well settled by a long and unbroken line of California Supreme Court and District Courts of Appeal decisions that a misrepresentation or concealment of a material fact, whether intentional or unintentional, in an application for life insurance which is relied upon by the insurer vitiates the contract of insurance.

*Insurance Code,* State of California, Secs. 331, 334, 358, 359, 360;

*California Western States Life Ins. Co. v. Feinsten* (1940), 15 Cal. 2d 413, 101 P. 2d 696;

*Telford v. New York Life Ins. Co.* (1937), 9 Cal. 2d 103, 69 P. 2d 835;

*Whitney v. West Coast Life Ins. Co.* (1918), 177 Cal. 74, 169 Pac. 997;

*Iverson v. Metropolitan Life Ins. Co.* (1907), 151 Cal. 746, 91 Pac. 609;

*Pierre v. Metropolitan Life Ins. Co.* (1937), 22 Cal. App. 2d 346, 70 P. 2d 985;

*Maggini v. West Coast Life Ins. Co.* (1934), 136 Cal. App. 472, 29 P. 2d 263;

*Westphall v. Metropolitan Life Ins. Co.* (1915), 27 Cal. App. 734, 151 Pac. 159.

In the case of *Telford v. New York Life Ins. Co., supra,* the action sought to recover death benefits on a policy of insurance upon the life of plaintiff's deceased wife. The action was defended on the ground of misrepresentations and concealments avoiding the policy. A *prima facie* case was made by plaintiff introducing the policy of insurance and proving the death of the insured. Defendant then proved certain representations which were made in the application, and by uncontradicted evidence proved that such representations were false. Judgment was rendered for plaintiff, and on appeal to the Supreme Court of the State of California the judgment was reversed. In its opinion the Supreme Court stated as follows:

> "A false representation or a concealment of fact whether intentional or unintentional, which is material to the risk vitiates the policy. The presence of an intent to deceive is not essential."

In the case of *Pierre v. Metropolitan Life Ins. Co., supra,* the action was instituted by plaintiff to recover death benefits on a policy of insurance upon the life of her husband. The usual *prima facie* case was proven and the company defended on the ground of misrepresentations

and concealments. Judgment in the trial court was rendered in favor of plaintiff, and in reversing that judgment the District Court of Appeal stated as follows:

> "Answers to questions in an application are generally considered to be material representations of fact, which if false will vitiate the contract (citing cases). . . . If the uncontradicted evidence shows that the insured, by false answers, misrepresented or concealed material facts, *the jury should have been instructed to find for appellant.*"

The other decisions above cited herein contain similar holdings and identical principles of law, and so well establish these principles as the law of the State of California as to admit of no doubt. Applying the law therein contained to the facts of our case, we find:

1. There Was No Conflict in the Evidence or Issue of Fact for Determination by the Jury on the Questions of (a) the Execution of the Application by Mr. Parrish or (b) the Purpose of the Application.

Execution of Parts I and II of the application was admitted by appellant (App. Br. p. 4, lines 9-21) and was established in court by the testimony of appellant. [Tr. II, p. 17, lines 16-26.] Since the policy of insurance itself expressly provides it was issued "in consideration of the application" and since the application, over Mr. Parrish's signature, further provides "that all statements contained in Parts I and II hereof are full, complete and true and are offered to the Company as a consideration for any contract of insurance that may be issued in pursuance thereof" and that "the above statements and answers shall be considered a basis for any policy that may be issued on the life of the proposed insured," there is no question

but that the application by agreement was the basis and consideration for the alleged contract of insurance and that the statements and representations therein were made for the purpose of inducing Acacia Mutual to rely thereon in issuing the proposed contract. There is no evidence to the contrary.

2. There Was No Conflict in the Evidence or Issue of Fact for Determination by the Jury as to Whether the Application Contained a Misrepresentation or Concealment of Fact.

a. *Mr. Parrish's Misrepresentations and Concealments in His Answers to Question 8.*

By his answer to question 8a Mr. Parrish, presumably after careful deliberation and consideration, stated and represented to Acacia Mutual that he had *never* had or been under *treatment, observation* or *diagnostic study* by a physician for *heart disease* or *disorder* of any kind, or *symptoms thereof,* such as heart weakness or pain, palpitation, shortness of breath, dizziness, etc.

This statement and representation was false and was known by Mr. Parrish to be false, the uncontradicted evidence being that of more than seventeen (17) recorded consultations with physicians by him during the period 1942-1946, at least four (4) arose out of Mr. Parrish's specific complaints of disease or disorder of the heart, or symptoms thereof. These consultations were as follows:

(1) On September 29, 1942, Mr. Parrish came to the offices of the Ross-Loos Clinic in Huntington Park, California, where he consulted Dr. John O. Murrin, M.D., and complained of "fluttery heart after retiring." He was examined by the doctor, had

medicine prescribed for him and was instructed to cut down cigarettes. [Tr. II, p. 54, line 7, to p. 55, line 7.]

(2) On October 4, 1943, he again consulted Dr. Murrin and complained of a "cardiac pain—severe" and weakness in the knees. His heart was again examined, intravenous and oral medicine prescribed, and the decision reached to have an electrocardiogram if the symptoms complained of returned. [Tr. II, p. 58, line 15, to p. 68, line 1.]

(3) On October 5, 1943, he returned to Dr. Murrin and complained, among other things, of "discomfort across the chest—like heartburn" and received heat treatment of the chest and a cough medicine. [Tr. II, p. 60, lines 2-13.]

(4) On August 22, 1945, he again complained to Dr. Murrin of "cardiac aching toward the left shoulder blade." His heart was again examined but no electrocardiogram or orthodiagram was taken; amphogel was prescribed. [Tr. II, p. 62, line 13, to p. 67, line 21.]

By his answer to question 8b Mr. Parrish, again presumably after careful deliberation and consideration, stated and represented to Acacia Mutual that he had *never* had or been under *treatment, observation* or *diagnostic study* for a *disease or disorder of lung or respiratory organs* such as *prolonged or frequent cough or hoarseness, bronchitis*, pleurisy, pneumonia, asthma, sinus trouble, etc., except for one mild attack of pneumonia in 1905.

This statement and representation was false and was known by Mr. Parrish to be false, the uncontradicted evi-

dence being that of the more than seventeen (17) recorded consultations with physicians by him during the period 1942-1946, at least six (6) arose out of Mr. Parrish's specific complaints of disease or disorder of lung or respiratory organs, including prolonged or frequent cough and bronchitis. These consultations were as follows:

(1) On December 3, 1942, Mr. Parrish called on Dr. Murrin in Huntington Park and complained of a chest cold of two days' duration. [Tr. II, p. 55, lines 8-15.]

(2) On December 24, 1942, he returned to Dr. Murrin and complained of a tight cough; he was examined, ammonium chloride, phenobarbital and a cough mixture were prescribed and a *diagnosis of bronchitis* made. [Tr. II, p. 55, line 22, to p. 56, line 25.]

(3) On September 8, 1943, he again consulted Dr. Murrin for a chest cold of three days' duration which apparently persisted at least until October 5, 1943. [Tr. II, p. 57, line 18, to p. 58, line 4.]

(4) On October 4, 1945, he consulted Dr. Leon Wolff, M.D., at the Ross-Loos Clinic in Huntington Park and complained of a bad cold and fever blisters. [Tr. II, p. 114, lines 1-17.]

(5) He again consulted Dr. Wolff on November 27, 1945, for generalized aches and pains, fever and a non-productive cough; sulfadiazine treatment was prescribed and he was ordered to bed. [Tr. II, p. 114, line 18, to p. 115, line 4.]

(6) On September 5, 1946, he consulted Dr. Peter Hershey for a hyperemic sore throat. [Defendant's Exhibit D.]

By his answer to question 8c Mr. Parrish, again presumably after careful deliberation and consideration, stated and represented to Acacia Mutual that he had *never* had or been under *treatment, observation or diagnostic study* for *disease or disorder of stomach, intestines, any abdominal organ, duodenum or bowels* such as appendicitis, dysentery, diarrhea, rectal disease, indigestion, abdominal pains, etc.

This statement and representation was false and was known by Mr. Parrish to be false, the uncontradicted evidence being that of the more than seventeen (17) recorded consultations with physicians by him during the period 1942-1946, at least six (6) prior to the application and two (2) before delivery of the policy arose out of Mr. Parrish's specific complaints of disease or disorder of stomach, intestines, abdominal organs, duodenum or bowels. These consultations were as follows:

(1) On July 31, 1942, Mr. Parrish consulted Dr. Murrin and complained of "gas for 4-5 days." He was examined and an antacid was prescribed. [Tr. II, p. 51, line 3, to p. 52, line 24.]

(2) Four days later he returned to Dr. Murrin and received infra-red treatment in the lumbar region; intravenous vitamin treatments were also prescribed, one injection being given on August 4, 1942, and additional injections given August 6, 10, 14, 19, 21, 26 and September 2, 4, 14 and 22, 1942. [Tr. II, p. 52, line 26, to p. 54, line 6.]

(3) On October 11, 1944, Mr. Parrish consulted Dr. Leon Wolff, M.D., at the Ross-Loos Clinic in Huntington Park and complained of pain in the right side; the appendix area was found to be ten-

der and the condition diagnosed as acute enteritis which the doctor explained to be an attack of inflammation of the bowel. Heat was ordered and Mr. Parrish was placed on a diet; a stomach digestant was prescribed. [Tr. II, p. 112, line 18, to p. 113, line 10.]

(4) On December 18, 1944, Mr. Parrish consulted Dr. Wolff again and complained of another similar attack. A gastro-intestinal series and a blood study were ordered by Dr. Wolff and a tentative diagnosis of chronic appendix made. [Tr. II, p. 113, lines 11-18; Defendant's Exhibit D.]

(5) On December 21, 1944, a gastro-intestinal study was made by Dr. Louis Baltimore, M.D., and a white blood count taken. [Tr. II, p. 102, line 8, to p. 106, line 9.]

(6) On August 22, 1945, Mr. Parrish visited Dr. Murrin and complained of heartburn and gas; amphogel was prescribed. [Tr. II, p. 62, lines 17-20.]

In addition to the misrepresentations and concealments contained in the application, it should also be noted that on October 30, 1946, subsequent to the date of signing the application but prior to the delivery of the policy and execution of his Certificate of Continued Health and Contract Acceptance, Mr. Parrish called Dr. Peter Hershey, M.D., to his residence and complained of aching in his stomach for four days. Examination at this time revealed tenderness to the touch in his epigastrium and soft abdominal muscles. A white blood count was taken which indicated a severe and serious infection somewhere in his system. On the basis of these complaints, symptoms, examinations and laboratory tests, Mr. Parrish was re-

ferred to surgery. On November 4, 1946, Mr. Parrish consulted Dr. John H. Lloyd, M.D., a surgeon connected with the Ross-Loos Clinic in Los Angeles, California. His condition was diagnosed by Dr. Lloyd as being an acute appendix, now subsiding; a soft diet was prescribed and removal of the appendix advised if there was any recurrence of these symptoms. [Tr. II, p. 31, line 6, to p. 32, line 7; Defendant's Exhibit D.]

b. *Mr. Parrish's Misrepresentations and Concealments in His Answer to Question 9.*

By his answer to question 9 Mr. Parrish stated and represented to Acacia Mutual that the last time he had consulted a physician, specialist or other practitioner was in 1940 when he had consulted a Dr. Wolf for an acute cold of mild severity and one week's duration.

This statement and representation was false and was known by Mr. Parrish to be false, the uncontradicted evidence being that, although Mr. Parrish told Acacia Mutual of his consultation with Dr. Wolf in 1940, he failed to tell Acacia Mutual of more than seventeen subsequent consultations with physicians during the period 1942 to the date of his application in 1946. [Defendant's Exhibit D.]

c. *Mr. Parrish's Misrepresentations and Concealments in His Answer to Question 10.*

By his answer to question 10 Mr. Parrish stated and represented to Acacia Mutual that he had had no ailments, injuries or diseases other than a mild attack of pneumonia in 1905 and an acute cold of one week's duration in 1940.

This statement and representation was false and was known by Mr. Parrish to be false, the uncontradicted

evidence being that he had had ailments or diseases other than those stated on July 31, 1942, August 4, 1942, September 29, 1942, December 3, 1942, December 24, 1942, September 8, 1943, October 4, 1943, October 5, 1943, October 11, 1944, December 18, 1944, December 21, 1944, August 22, 1945, October 4, 1945, November 27, 1945, September 5, 1946, October 30, 1946, and November 4, 1946. [Defendant's Exhibit D.] Appellant's contention that such illnesses as Mr. Parrish had on these dates could not be considered "ailments or diseases" is particularly remarkable when considered in the light of Mr. Parrish's own written statement in this answer that a light attack of pneumonia in 1905 and an acute cold in 1940 *were* ailments or diseases which he considered material and substantial enough to report.

d. *Mr. Parrish's Misrepresentations and Concealments in His Answer to Question 12.*

By his answer to question 12 Mr. Parrish stated and represented to Acacia Mutual that the full particulars of ALL diseases, injuries or ailments which he had had or for which he had been under treatment, observation or diagnostic study, including the full particulars with respect to all the matters covered in questions 8, 9 and 10, had been given to Acacia Mutual in his answer to question 12. This answer listed the previously noted mild attack of pneumonia in 1905 and an acute cold of mild severity for which he had consulted Dr. Wolf of the Ross-Loos Clinic in Los Angeles, California, in 1940.

This statement and representation was false and was known by Mr. Parrish to be false, the uncontradicted evidence being that he had not stated the full particulars with

respect to all the matters covered in questions 8, 9 and 10 and that he had had diseases or ailments other than those stated in his answer for which he had been under treatment, observation or diagnostic study on July 31, 1942, August 4, 1942, September 29, 1942, December 3, 1942, December 24, 1942, September 8, 1943, October 4, 1943, October 5, 1943, October 11, 1944, December 18, 1944, December 21, 1944, August 22, 1945, October 4, 1945, November 27, 1945, September 5, 1946, October 30, 1946, and November 4, 1946. [Defendant's Exhibit D.] Again it is pointed out that each of the above noted consultations was for ailments patently more serious than an acute cold and obviously more likely to be recalled by Mr. Parrish than treatment in 1905 and 1940.

e. *Mr. Parrish's Misrepresentations and Concealments in His Answer to Question 13.*

By his answer to question 13 Mr. Parrish stated and represented to Acacia Mutual that he had consulted no physician, specialist or other practitioner other than Dr. Wolf in 1940 for an acute cold of mild severity and a doctor whose name he did not remember for a mild attack of pneumonia in 1905.

This statement and representation was false and was known by Mr. Parrish to be false, the uncontradicted evidence being that he had consulted Dr. Murrin on July 31, 1942, August 4, 1942, September 29, 1942, December 3, 1942, December 24, 1942, September 8, 1943, October 4, 1943, October 5, 1943, August 22, 1945; Dr. Baltimore on December 21, 1944; Dr. Wolff on October 11, 1944, December 18, 1944, October 4, 1945, and November 27, 1945; Dr. Hershey on September 5, 1946, and October

30, 1946; and Dr. Lloyd on November 4, 1946. [Defendant's Exhibit D.]*

It is inconceivable that all of the above noted consultations, treatments, diagnostic studies, diseases, ailments and symptoms could have escaped the notice of Mr. Parrish under any circumstances. It is especially inconceivable that they should have escaped his notice in view of the fact that specific direct questions in his application repeatedly brought them to his attention. They were, of course, matters peculiarly within the knowledge of Mr. Parrish as between the contracting parties.

3. The Misrepresentations and Concealments Contained in Mr. Parrish's Application Were Material to the Risk as a Matter of Law.

The California Supreme Court, whose decisions are here controlling, has uniformly held that information specifically called for by questions in an application for life insurance is material as a matter of law.

*Insurance Code,* State of California, Secs. 331, 334, 360;

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*The medical records submitted by appellee [Defendant's Exhibit D] show a total of some thirty-eight (38) visits by Mr. Parrish to to the Ross-Loos Clinic. Twenty-one of these visits are not included either because the records indicate they may have been for trivial or inconsequential ailments or because the record is not clear as to the specific doctor consulted or that the visit related to matters covered by specific questions in the application or Certificate of Continued Health and Contract Acceptance. The dates of these twenty-one additional visits are: February 7, 1942, August 6, 1942, August 10, 1942, August 14, 1942, August 19, 1942, August 21, 1942, August 26, 1942, September 2, 1942, September 4, 1942, September 14, 1942, September 22, 1942, October 18, 1942, March 2, 1943, December 29, 1944, February 14, 1945, February 27, 1945, September 1, 1945, March 14, 1946, March 15, 1946, March 16, 1946, and March 18, 1946.

*California Western States Life Ins. Co. v. Feinsten* (1940), 15 Cal. 2d 413, 423, 101 P. 2d 696;

*Telford v. New York Life Ins. Co.* (1937), 9 Cal. 2d 103, 107, 69 P. 2d 835;

*Iverson v. Metropolitan Life Ins. Co.* (1907), 151 Cal. 746, 749, 91 Pac. 609;

*Pierre v. Metropolitan Life Ins. Co.* (1937), 22 Cal. App. 2d 346, 348, 350, 70 P. 2d 985;

*Maggini v. West Coast Life Ins. Co.* (1934), 136 Cal. App. 472, 475, 29 P. 2d 263;

*McEwen v. New York Life Ins. Co.* (1914), 23 Cal. App. 694, 139 Pac. 242.

In *California Western States Life Ins. Co. v. Feinsten, supra,* plaintiff insurer sued to cancel the disability provisions of a life insurance policy reinstated by defendant Feinsten on the basis of misrepresentations and concealments in an application very similar in the language of many of its questions—and answers—to the application made by Mr. Parrish. The California Supreme Court, in affirming the trial court's judgment in favor of the insurer, held as follows at pages 423 and 424:

> "Appellants next contend that the representations made by the insured in the application form were not material representations in that the illness for which insured had received the several treatments in the fall of 1934, assertedly, was not of a substantial character and, consequently, that a failure on his part to disclose such illness did not constitute fraud. *However, a reading of the application shows that the insured was not questioned with respect to the gravity of the illness, if any, for which he had consulted a physician. The question presented was 'Have you consulted a*

*physician for any ailments since the above-numbered policy was issued? List below all details in regard thereto . . .' That question merely called for information relating to simple matters of fact within the knowledge of the insured.* It has been held that *answers to written questions set forth in application forms relative to insurance are generally deemed material representations* (citing cases); and that in the making of a false representation which is material to the risk the presence of an intent to deceive is not essential. (Citing cases.) (6) The materiality of a representation is to be determined 'solely by the probable and reasonable influence of the facts upon the party to whom the communication is due, in forming his estimate of the disadvantages of the proposed contract, or in making his inquiries.' (Ins. Code, sec. 334.)"

"Much of the medical evidence adduced by the insurance company in the present case was to the effect that the symptoms shown by the insured at the time he consulted Dr. Swezey in August, 1935, were possible indications of a heart condition such as the insured claimed to have been suffering from in June, 1936. Therefore, under the circumstances hereinbefore recited, it may not be said that the information which the insurer sought to obtain by the questions set forth in the application form was not material to the risk."

In *Iverson v. Metropolitan Life Ins. Co., supra,* the Supreme Court said at page 749:

"*There can be no question* but that the written answers in the application for insurance made by the insured in response to the questions asked him relative to whether he had ever had any of the diseases

specifically mentioned in the questions were material to the risk assumed by the respondent; that the contract of insurance was based on them and on the agreement of the insured that if *any* answer was untrue the policy to be issued thereon should be void."

In *Pierre v. Metropolitan Life Ins. Co., supra,* defendant Metropolitan appealed from a judgment for plaintiff on the grounds that the trial court erred in denying its motion for a directed verdict. In reversing the judgment and thus holding the directed verdict should have been ordered, the court states at page 348:

"Answers to questions in an application are generally considered to be material representations of fact, which if false will vitiate the contract. (*Iverson, supra; Layton v. New York Life Ins. Co.,* 55 Cal. App. 202, 202 Pac. 958; *Maggini, supra.*) The wording of the question may be important in determining the falsity of the answer. The first question inquired as to a specified disease, while the others were asked concerning any ailment or disease. An answer to a question as to whether an applicant had ever had a specified disease is material and, if false, voids the policy."

In *Maggini v. West Coast Life, supra,* the misrepresentations arose out of the insured's answer to the questions "Have you ever consulted a physician or practitioner for or have you ever had symptoms pertaining to or disease of: . . . the lungs?" and "What physician or practitioner or any other person not named above have you consulted or been treated by within the last five years and for what illness or ailment?" The evidence showed that prior to making his application the insured had suffered from and been treated for shortness of

breath and acute bronchitis and had at one time been treated for pneumonia. Defendant's appeal was from the trial court's denial of its motions for directed verdict, for judgment notwithstanding the verdict and for a new trial. In reversing the trial court and ordering judgment for the company, the court said, at pages 475 and 476:

> *"The materiality of the representations cannot be doubted, these being in the form of written answers made to written questions which the parties themselves thus indicated they deemed material.* (Citing cases.) Likewise there can be no controversy that these representations were relied upon by the insurer in issuing the policies. Evidence to this effect was received without objection as was also evidence that if the insurer had known that these representations were false the policies would not have been issued. There was no evidence to the contrary."

In *McEwen v. New York Life Ins. Co.,* 187 Cal. 144, 201 Pac. 577, the Supreme Court, in affirming the judgment of the trial court in which that court directed a verdict in favor of the defendant, stated:

> "Since the evidence conclusively shows the answer to the question concerning 'illnesses, diseases and accidents' was untrue and, according to the law laid down for the guidance of the trial court, the truth or falsity of the answers was the determining factor and the only question to be submitted to the jury, it was proper for the judge to direct a verdict for defendant upon the theory that a material question had been falsely answered."

In an earlier appeal in this same case where the District Court of Appeal (42 Cal. App. 133) reversed a judgment

of the trial court denying the motion for new trial made by the insurer this additional language is found:

> "The materiality of representations was a question of law for determination of the court and not the jury.
>
> "It would be a violation of the legal rights of the company to take from it its acknowledged power, thus to make its opinion the standard of what is material, and to leave that point to the determination of a jury. (Jefferies v. Economical, etc. Ins. Co., 22 Wall. 47 (22 L. ed. 833 . . .).)"

These principles have been followed by the Federal cases in this circuit.

> *Gates v. General Casualty Co. of America,* 120 F. 2d 925 (C. C. A. 9th, 1941). (Citing the *Cal. Ins. Code* and the *Telford* and *Maggini* cases);
>
> *Strangio v. Consolidated Indemnity & Ins. Co.,* 66 F. 2d 336 (C. C. A. 9th, 1933). (Citing *Civ. Code,* Secs. 2562, 2563 and 2565, which are now *Ins. Code* Secs. 332, 333 and 334);
>
> *Smith v. Royal Ins. Co.,* 37 Fed. Supp. 841 (N. D. Cal., 1941). (Citing the *Telford* and *Feinsten* cases.)

A distinction has been recognized from time to time between questions calling for the *opinion* of the applicant which may be relative or comparative and *specific* questions calling for *specific* answers. Typical of such *opinion* questions are the ones in issue in *Willis v. Policy Holders Life Ins. Ass'n,* 12 Cal. App. 2d 659, 55 P. 2d 920, relied on so strongly by appellant. This type of question and, therefore, the *Wills* case itself are obviously distinguishable from the case at bar.

Appellant's brief has also referred to and apparently relies heavily upon a group of cases in California which hold in effect that there is no duty upon the insured to reveal consultations or visits to a physician for some feeling of trivial discomfort or temporary indisposition not affecting his general health, or to reveal general medical check ups where no specific complaint is involved, or to reveal a physical condition of which he has no knowledge. This group of cases consists of:

*Poole v. Grand Circle W. O. W.,* 18 Cal. App. 457;

*Travelers Ins. Co. v. Byers,* 120 Cal. App. 473;

*Byers v. Pacific Mutual Life Ins. Co.,* 133 Cal. App. 632-638.

Irrespective of whether these cases represent any present law in California, they particularly have no application here, in view of the fact that the evidence in this record shows a pattern or syndrome of symptoms and complaints and a continuous series of consultations and treatments for the specific diseases, disorders and symptoms specifically referred to in the application.

For example, in the *Poole* case above referred to the court simply held that failure to reveal visits to a physician for trivial discomforts or a temporary indisposition such as a vaginal examination, cold, or for the prescription for general tonic to give the insured a better appetite, need not be disclosed.

Again in the *Travelers* case above referred to, the evidence showed several visits to a physician and to the La Jolla Clinic, but there was no evidence whatsoever in the record as to the purpose of such visits or the nature of the complaints, if any, or diagnoses, if any, which were

made. In fact, the court states in its opinion that it did not appear from the record whether the visits or consultations were for an illness of the insured or in regard to an illness of some member of his family. Under the circumstances the court in that case very properly held that it could not *presume* that such consultations or hospitalizations at the clinic were for anything more than a temporary illness or perhaps for a mere physical examination.

Again in the *Pacific Mutual* case the record indicates that the insured entered the Scripps Clinic at La Jolla where he remained for one night for a "general check up," and that he was told by his physician that he could not find a thing wrong with him at that time, and he went home promptly. The court in that case, referring to the *Poole* case and *Travelers* case, again held that there is no duty on an insured to disclose a treatment or consultation or hospitalization which involves simply a general check up which revealed no illness or disease whatsoever.

The facts in the cases above referred to are surely a far cry from the record in the case at bar, wherein consultations and treatments are shown without contradiction to have taken place, and wherein such treatments were for the specific ailments referred to in the application for insurance, and wherein specific diagnoses had been made. It is also interesting to note that in each of the three cases above referred to there is no causal connection between the concealments and representations and the cause of death, while in the case at bar many of the specific cardiac symptoms and complaints which were concealed and misrepresented apparently resulted in the death of the insured from a heart attack.

Even, however, if every question in this application be considered an *opinion* question—an approach which can-

not be taken as to any of the questions asked Mr. Parrish —there still is no question of fact on the issue of materiality for presentation to the jury since the only and undisputed testimony found in this record as to the materiality of the misrepresentations and concealments is that they were material. The deposition of Allen Weisman, an officer and underwriter of Acacia Mutual, together with the deposition of Dr. Merwin Hummel, its assistant medical director, is the sole evidence concerning the materiality of the representations and is therefore the only evidence as to the probable or reasonable influence of the matters misrepresented and concealed upon Acacia Mutual. In that portion of Mr. Weisman's deposition, wherein he is questioned as to what effect knowledge of the misrepresentations and concealments in the application and Certificate of Continued Health and Contract Acceptance would have had on his decision to approve or disapprove Mr. Parrish's application, commencing with the answer to question 16 and continuing through the answer to question 26, the witness states in each answer "I would not have approved the application . . ." [Tr. II, pp. 139-157.] Although in some of his answers he states that he would have required further information as to the nature of the ailments or consultations or in some instances would have referred it to the medical department, the uncontradicted fact is that in every instance, without equivocation and categorically, *he states he would not have approved the application.* Without such approval the policy of course would not have issued. This testimony is confirmed by the deposition of Dr. Hummel. [Tr. II, pp. 184-185.]

In the great majority of the cases above cited the decisions of the California Supreme Court and District Courts of Appeal have been reached upon factual situations in-

volving misrepresentations with respect to one or two consultations or treatments by physicians or surgeons, the degree of "seriousness" of the ailment not being the test of materiality but rather the probable influence of the facts upon the party to whom the communication was due. A false answer to a specific question has been uniformly held fatal.

The rationale behind these holdings is particularly well stated in the leading Arizona Supreme Court case of *Illinois Bankers Life Association v. Theodore,* 47 Ariz. 327, 55 P. 2d 811. In this case the principal question was the materiality of a misrepresentation in the application as to habitual coughing. The court held the misrepresentation material as a matter of law, stating at page 327:

> "It is urged by counsel for plaintiff that coughing, even of the nature described by these witnesses, may at times be produced by a comparatively harmless cause, such as excessive smoking or a minor weakness of the throat and that, therefore, the answer falls within the category of matters of opinion, where it is necessary that bad faith on the part of the applicant should be shown, and not matters of fact, where bad faith and intent to deceive are immaterial. We think counsel entirely misapprehends the nature and purpose of the question and of our ruling on the first appeal. It is not contended by defendants that habitual coughing is, *of itself,* a disease. The reason why the question is asked is not to ascertain the opinion or knowledge of the applicant in regard to the existence of any particular disease, but to reveal the facts to the insurer so that it, knowing their existence, may form an opinion in regard to the existence of the disease by a more careful examination of the applicant. Such being the purpose of and justification for

the question, it is immaterial whether the applicant *believes* that he has or has not any particular disease or whether he actually has it. If the coughing is of such a nature that it *might* reasonably be a symptom of one of the named diseases, the insurer is entitled to know the fact for its own protection. We are of the opinion that it was not necessary for the defendants to show that the deceased either knew or believed that his habitual cough was caused by one of the named diseases. It was sufficient to void the policy if he knew the cough was habitual in its nature, and so knowing, failed to reveal its existence in his application."

Similarly, the District Court in its opinion in the within action has concisely interpreted the rationale of the California cases by pointing out that, although many of Mr. Parrish's ailments were serious, some of the complaints for which he consulted physicians and received treatment might be classified as inconsequential *per se* but were not inconsequential in this instance since not only were they specifically asked about but the very symptoms denied were those which might have, if properly followed up and known to Acacia Mutual, indicated the very condition that ultimately caused death. Thus emphasized is the materiality of the information withheld.

Even if, solely for the purpose of argument, the somewhat fantastic conclusions and interpretations by plaintiff of the evidence be adopted to the effect that no single or by itself material misrepresentation can be found, there still remains the cumulative and over-all effect of the total number of misrepresentations and concealments by

Mr. Parrish to be considered. Businessmen such as Mr. Parrish do not take countless hours from their work and repeatedly drive long distances from their offices to secure medical assistance simply because it is available as part of a group medical insurance program. Nor do they in the normal course of events repeatedly complain of ailments, consult physicians and surgeons, restrict their diet, subject themselves to repeated tests and injections, purchase expensive medicines, restrict their personal pleasures—or die at the age of 48.

There is, then, here a pattern of complaints, symptoms, consultations, treatments, laboratory studies, diagnoses, prescriptions and recurrences that to the ordinary man, if not to a sympathetic jury, suggests but one thing—poor health. To an insurance company it represents even more, of course: a shorter life span and an uninsurable risk. Revelation of such a pattern to an insurance company may be and often is of substantially more materiality to the acceptance or rejection of an applicant than a history of a single, isolated, "serious" disease from which an applicant may have recovered. Concealment of such a pattern may be and often is, therefore, of substantially greater importance and materiality. For this reason are insurance applications designed to obtain the facts and not opinions; and for this reason, in addition to the specific misrepresentations and concealments, is the multiplicity and cumulative effect of the misrepresentations and concealments in Mr. Parrish's application in itself material as a matter of law.

4. There Was No Conflict in the Evidence or Issue of Fact for Determination by Jury as to the Reliance by Acacia Mutual on the Statements and Representations in the Application in Issuing the Alleged Contract of Insurance.

Under the law of California it is presumed, as a matter of law, that an insurance company relied on the answers as written in an application for a life insurance policy.

*Iverson v. Metropolitan Life Ins. Co.,* 151 Cal. 746, 91 Pac. 609;

*Layton v. New York Life Ins. Co.,* 55 Cal. App. 202, 202 Pac. 958.

In the *Iverson* case the Supreme Court of the State of California said:

> "There can be no question but that the written answers . . . were material to the risk assumed by respondent, *that the contract of insurance was based on them* . . ."

In *Layton v. New York Life Ins. Co., supra,* the court stated at page 205:

> "By the terms of the policy of insurance delivered to plaintiff's husband, the policy itself and the application therefor, copy of which, including the questions and answers making up the medical examination, was attached to the policy, constituted the entire contract between the company and the insured. Layton over his own signature declared that he had carefully read each and all of the answers given to the medical examiner, that each was written as made by him, and

that each was full, complete and true. The statements contained in the application thereby became his solemn representations and of the same binding force upon him as though he had himself written them out in his own handwriting and signed them. (*Westphall v. Metropolitan Life Ins. Co.,* 27 Cal. App. 734, 738 (151 Pac. 159).) It needs no citation of authority to support the rule that misrepresentation or concealment of the facts relative to the health of those whose lives are insured are peculiarly fatal to contracts of life insurance, *because the companies necessarily rely upon the statements and acts of the insured in making the contracts.* (See *Equitable Life Assur. Soc. v. McElroy,* 83 Fed. 631 (28 C. C. A. 365); *Whitney v. West Coast Life Ins. Co.,* 177 Cal. 74, 80 (161 Pac. 997).)"

There was, however, no issue of fact for determination by the jury as to the reliance of Acacia Mutual on the application in this case, irrespective of the prevailing California law, since the undisputed and only evidence on that issue is the deposition testimony of Allen Weisman which was read into evidence. The deposition is quoted as follows:

"14 (Q) Did you rely upon the information relating to the prior health of the said Thomas Harry Parrish contained in Part II of said application, Exhibit '1', when you approved said application?

"14 (A) Yes, I did rely upon the information relating to the prior health of Thomas Harry Parrish contained in Part II of the application when I approved the application." [Tr. II, p. 139.]

B. **Under California Law, a False Representation or a Concealment of a Material Fact With Respect to a Change in Health or With Respect to Information Asked for in the Application That Comes to the Knowledge of the Applicant After the Application and Before Delivery of the Contract and Payment of the First Premium Thereon Vitiates the Contract of Insurance.**

*Pierre v. Metropolitan Life Ins. Co.,* 22 Cal. App. 2d 346, 70 P. 2d 985;

*Stipcich v. Metropolitan Life Ins. Co.,* 277 U. S. 311, 72 L. Ed. 895, 899 (certification from 9th C. C. A.);

*New York Life Ins. Co. v. Gist* (C. C. A. 9th, 1933), 63 F. 2d 732.

See also:

*Subar v. New York Life Ins. Co.* (C. C. A. 6th, 1932), 60 F. 2d 239;

*Combs v. Equitable Life Ins. Co. of Iowa* (C. C. A. 4th, 1941), 120 F. 2d 432;

*Mass. Mut. Life Ins. Co. v. Cohen etc. Co.* (C. C. A. 6th, 1948), 166 F. 2d 63;

*Glickman v. New York Life Ins. Co.* (Court of Appeals, New York), 50 N. E. 2d 538.

In the case of *Pierre v. Metropolitan Life Ins. Co., supra,* the doctrine set forth above is clearly stated as the settled and prevailing law of the State of California, as follows:

> "The insured was obligated to disclose to the insurer any material change in his physical condition which occurred in the period between the date of his application and the date of the policy's delivery. (*Security Life Ins. Co. v. Booms,* 31 Cal. App. 119, 159 Pac. 1000.)"

In the case of *Stipcich v. Metropolitan Life Ins. Co., supra,* the doctrine, which is followed without exception throughout the United States, is again stated as follows:

> "Insurance policies are traditionally contracts *uberrimae fidei* and a failure by the insured to disclose conditions affecting the risk, of which he is aware, makes the contract voidable at the insurer's option. (Citing cases.) Concededly the modern practice of requiring the applicant for life insurance to answer questions prepared by the insurer has relaxed this rule to some extent, since information not asked for is presumably deemed immaterial. (Citing cases.)
>
> "But the reason for the rule still obtains, and with added force, as to changes materially affecting the risk which come to the knowledge of the insured after the application and before delivery of the policy. For, even the most unsophisticated person must know that in answering the questionnaire and submitting it to the insurer he is furnishing the data on the basis of which the company will decide whether, by issuing a policy, it wishes to insure him. If, while the company deliberates, he discovers facts which make portions of his application no longer true, the most elementary spirit of fair dealing would seem to require him to make a full disclosure. If he fails to do so the company may, despite its acceptance of the application, decline to issue a policy, (citing cases), or if a policy has been issued, it has a valid defense to a suit upon it."

The other cases hereinabove cited follow the rule as stated above and are factually identical to the case before this court with the exception that they relied in the main on the language contained in the application and did not have the additional and strengthening factor of the writ-

ten and executed Certificate of Continued Health and Contract Acceptance found here.

As previously noted, Mr. Parrish not only agreed in Part I of his application "that there shall be no contract of insurance until the policy shall have been issued by the company and delivered by a duly authorized agent of the company and the first premium paid thereon, all during the proposed insured's life and continuance in good health" but also stated and represented on November 6, 1946, in his written Certificate of Continued Health and Contract Acceptance "that the first premium on said insurance contract was tendered to the company during the continued good health of the proposed insured; and (3) that prior to the date said premium was tendered proposed insured except as stated in the application for said insurance contract had not been sick and had not consulted or been treated or attended by a physician."

The uncontradicted evidence supporting the contention of Acacia Mutual that Mr. Parrish (1) had suffered a material change of health during the period from the date of the application to the date of delivery of the policy and execution of the above noted Certificate and (2) had been sick and had consulted and been treated and attended by both a physician and a surgeon during this period has previously been brought to the attention of the court and therefore will not be here repeated. [Appellee's Statement of the Case; Defendant's Exhibit D; Tr. II, pp. 29-45, 93-95, 99.] The evidence is undisputed that delivery of the policy was based upon the statements and repre-

sentations contained in the above referred to Certificate and that the policy would have been recalled and would not have been delivered if the true facts had been made known to Acacia Mutual or to the delivering agent. [Tr. II, pp. 162-164, 198-199.]

It is submitted that, upon the basis of the material misrepresentations and concealments found in the Certificate of Continued Health alone, Acacia Mutual was entitled to its directed verdict and to its motion to set aside verdict and for judgment, and in the alternative, for a new trial.

In summary, we submit that, under the authority of *Mutual Life Ins. Co. of New York v. Morairty,* 178 F. 2d 470, 473, and the applicable California decisions, (a) since defendant by uncontradicted evidence established its defense (that Mr. Parrish had misrepresented and concealed material facts in his *application*) as a matter of law and was therefore entitled to a directed verdict or to a judgment notwithstanding the verdict; and (b) since defendant by uncontradicted evidence established its defense (that Mr. Parrish had misrepresented and concealed a material fact in his *Certificate of Continued Health and Contract Acceptance*) as a matter of law and was therefore entitled to a directed verdict or to a judgment notwithstanding the verdict, the District Court did not err in granting defendant's motion to set aside verdict and for judgment, and in the alternative for a new trial.

II.

**The District Court Did Not Err in Denying Plaintiff's Motion for Directed Verdict.**

Even the most cursory review of the facts of this case and the California law applicable thereto makes it apparent that the true question to be determined on this appeal is whether or not the appellee had established its defense (that Mr. Parrish had misrepresented or concealed material facts in his application or in his Certificate of Continued Health and Contract Acceptance) as a matter of law and was therefore entitled to a directed verdict or to a judgment notwithstanding the verdict. If appellee had so established its defense, then the District Court did not err in granting appellee's motion to set aside verdict and for judgment.

*Mutual Life Ins. Co. of New York v. Morairty, supra.*

See cases cited, Appellee's Brief I-A, *supra.*

Since, however, appellant has chosen to place the principal portion of what argument appellent has advanced under the heading "The Trial Court Erred in Denying Plaintiff's Motion for a Directed Verdict," the factual and legal presentation thereunder must be considered with relation to that issue as well as the *true* issue, despite the confusion created thereby and the obvious lack of weight and authority in appellant's argument as applied to either issue.

Appellant's apparent factual and legal argument is that the trial court erred in denying plaintiff's motion for a directed verdict because (a) plaintiff had established a *prima facie* case and was aided by presumptions as a matter of law; (b) the insured was not suffering

from any ailment or disease at the time he signed his application for insurance, and had not consulted a physician for any disease or ailment; and (c) from the time the insured signed the application to the time the policy of insurance was delivered, there was no material change in the physical condition of the insured. (Appellant's Brief, pp. i and ii.)

Considering appellant's argument in this order, the *prima facie* case made by plaintiff in the trial court, and referred to under Appellant's Point IA, consisted of the introduction into evidence of the policy and certain stipulations (not material here) with respect to the terms thereof, and proof of death and insurable interest.* [Tr. II, pp. 10-14.] It was, therefore, essentially identical in legal effect to the *prima facie* case made in *Telford v. New York Life Ins. Co., supra, Whitney v. West Coast Life Ins. Co., supra, Iverson v. Metropolitan Life Ins. Co., supra, Pierre v. Metropolitan Life Ins. Co., supra, Maggini v. West Coast Life Ins. Co., supra, Westphall v. Metropolitan Life Ins. Co., supra,* and *McEwen v. New York Life Ins. Co., supra,* previously cited under Point I of this brief. In each of those cases not only was such a *prima facie* insufficient to obtain a directed verdict for plaintiff but in all of them it was insufficient to prevent a directed verdict or a reversal of judgment refusing directed verdict for the insurer.

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*In addition to the *prima facie* case presented, appellant's negligible rebuttal evidence included records of examinations of Mr. Parrish made every two years by the Standard Oil Company to determine employability. [Plaintiff's Exhibit 3.] It is noted that no records of the Standard Oil Company during the crucial period 1942-1946 were introduced, even though the records submitted show that after 1940 an annual rather than biennial examination was required by the employer.

Insofar as the exaggerated presumptions claimed by appellant are concerned, it must be pointed out that of the fourteen cases cited and quoted by appellant in support of the existence of the presumptions as claimed (Appellant's Brief, pp. 24-32), not one single case is of any authority or assistance to this court in determining any of the issues herein, either because a remote factual situation was involved (fire insurance, automobile insurance, real estate agreement, partnership accounting) or because the law discussed was that of a foreign jurisdiction with different requirements than California (Washington, Massachusetts, Tennessee, District of Columbia) or because the legal issue presented to the court in the case was whether or not *intentional* misrepresentations—true fraud—had been made. As has been previously noted, in California misrepresentations or concealments in an application for life insurance will vitiate the contract whether made intentionally or unintentionally. (*Insurance Code,* State of California, Section 331; *Pierre v. Metropolitan Life Ins. Co., supra.*) Most of these fourteen cases are distinguishable on two or more of the above noted grounds.

Appellant's Point IB and subpoints thereunder are apparently based on appellant's self-serving conclusion that a consideration of Mr. Parrish's medical history for the period 1942-1946, as revealed by the Ross-Loos Clinic records and by the various doctors who testified, only shows that he was never diagnosed, even tentatively, as having any illness, ailment or disease; never received any treatment except heat applications; never received any medication of any importance; at all times had a normal, healthy physical constitution; and only consulted the physicians who testified for mere indispositions and because the medical services were free. (Appellant's

Brief, p. 25.) Therefore the insured, says appellant, was not suffering from any ailment or disease at the time he signed his application for insurance and had not consulted a physician for any ailment or disease; and further, says appellant, from the time insured signed the application to the time the policy was delivered there was no material change in the physical condition of insured. (Appellant's Brief, pp. 32-67.)

Such a conglomeration of incorrect and unsupported factual and legal conclusions of course begs entirely the question of *whether or not Mr. Parrish gave false answers to specific questions in his application and misrepresented and concealed facts within his exclusive knowledge as between the contracting parties which, if known to Acacia Mutual, would have caused them to refuse the application.*

To state, however, that no diagnosis, not even a tentative one, was ever made is simply to ignore (1) the gastro-intestinal ailment diagnosis made by Dr. Murrin on July 31 and August 4, 1942, (2) the bronchitis diagnosis made by Dr. Murrin on December 24, 1942, (3) the acute enteritis diagnosis made by Dr. Wolff on October 11, 1944, (4) the tentative diagnosis of chronic appendix made by Dr. Wolff on December 18, 1944, (5) the repeated cold and sore throat diagnoses made by Dr. Murrin on December 3, 1942, September 8, 1943, and October 3, 1943, by Dr. Wolff on October 4, 1945, and by Dr. Hershey on September 5, 1946, and (6) the subsiding acute appendix diagnosis made by Dr. Lloyd on November 4, 1946.

To state further that Mr. Parrish never received any treatment other than heat applications nor any medication of any importance again ignores treatment or advice received at each of the more than seventeen visits to

physicians and the uncounted prescriptions of sulfadiazine, phenobarbital, tincture of belladonna, amphogel and intravenous B-Complex injections as well as cough remedies and numerous other medicines, some of which under California law required a doctor's prescription to obtain, were costly, and were not provided by the clinic.

Further, to state that all examinations and laboratory tests showed a normal, healthy constitution is again simply to ignore examinations showing gastro-intestinal ailments and disorders, respiratory ailments and disorders, possible chronic appendix, pain in lower abdomen, tenderness to touch in epigastrium and acute appendix as well as laboratory tests showing a white blood count twice the normal.

Finally, to claim that "from the time the insured signed the application to the time the policy of insurance was delivered, there was no material change in the physical condition of the insured" is to ask this court to ignore both the precise language of Mr. Parrish's Certificate of Continued Health and Contract Acceptance and the medical testimony and records concerning the serious and severe ailment he suffered from during that period.

Since it was Mr. Parrish who either went to the doctors or called them to his home; since it was Mr. Parrish who suffered from and made the complaints noted in their records; and since it was Mr. Parrish who gave the blood for the blood count and paid for and swallowed the sulfadiazine, phenobarbital, tincture of belladonna, amphogel and other prescribed medicines and received the hypodermic for his B-Complex injections and the barium for his gastro-intestinal series, and gave up his cigarettes, and ate the diets ordered and wrote from Paso Robles to Los Angeles for refills of prescriptions, it is difficult

to conceive that he was, as argued by appellant, completely without knowledge of any of the matters which he failed to reveal in his answers to the specific questions in his application—particularly in view of the fact that he recollected so well a mild pneumonia attack when he was five years old and a mild acute cold in 1940.

Appellant's argument and all the authorities cited and quoted therein in support of that argument can thus only be classified as a desperate reliance on rhetoric in an effort to avoid the language of the specific questions in the application *and Mr. Parrish's own recorded interpretation of that language as shown by his answers to questions 8b, 9 and 12 of the application.* To determine what Mr. Parrish, as one of the contracting parties, understood the words "disease," "ailment," "disorder" and "consultation" to mean, it is not necessary to quote at length from and rely on the language in cases decided by this Circuit Court prior to *Erie Railroad Company v. Tompkins, supra,* or cases decided in 1883 and 1884 on the basis of New York and Pennsylvania law; nor is it necessary to look to cases in the First, Fifth and Sixth Circuits where the law before the courts was that of jurisdictions other than California which required that the misrepresentations be made with intent to deceive. Of little more value are California appellate decisions distinguishable on their facts because "opinion" questions were the important element or because of the peculiar wording of the question and answer in issue or the particular lack of knowledge of an illiterate or uninformed applicant; appellee and this Court also do not need lengthy quotes from cases such as *Travelers v. Byers,* 123 Cal. App. 473, 11 P. 2d 444, to ascertain that a failure to disclose facts of which the applicant is ignorant is not fatal. Here, such ignorance is not present for, as stated

above, it was Mr. Parrish who called on the doctors and told them his complaints and his symptoms and received and followed the treatment prescribed as a result of their various diagnoses. It is not necessary to refer to such cases because Mr. Parrish in his application tells us plainly that *to him* a mild attack of pneumonia at the age of five and a mild acute cold were "diseases," "ailments" or "disorders," and Mr. Parrish in his application tells us again plainly and clearly that *to him* visiting a doctor for a mild acute cold was a "consultation." The fact that there had been more than seventeen consultations by Mr. Parrish with physicians for more serious diseases, ailments and disorders than those communicated was known exclusively to Mr. Parrish as between these parties and is undisputed, and the fact that such a pattern of continuing and recurrent complaints, consultations and treatments is of overwhelming importance to a life insurance company in determining whether or not a risk is acceptable cannot be disputed.

Appellee therefore submits again that the uncontradicted evidence in this record is that Mr. Parrish misrepresented and concealed material facts within his knowledge which if known to Acacia Mutual would have caused it to refuse to issue or deliver the policy here sued upon; that by such uncontradicted evidence appellee had under California law proved its defense as a matter of law and was therefore entitled to a directed verdict or to judgment notwithstanding the verdict; and that, *ipso facto,* the District Court did not err in denying plaintiff's motion for directed verdict.

III.

**The District Court Did Not Err in Granting Defendant's Motion for New Trial, in the Alternative, and Its Order in This Regard Is Not Reviewable.**

The major portion of Point II of Appellant's Brief (pp. 67-73) is devoted to the contention that the trial court erred in granting defendant's motion to set aside verdict and for judgment. We have heretofore thoroughly discussed this contention under Point I of this brief and, we submit, have completely answered it. Therefore we will confine our argument to what appear to be appellant's other contentions, namely, that the trial court erred in granting defendant's motion for new trial in the alternative; and that in any event if the order granting judgment notwithstanding the verdict is reversed, then the case should not be remanded to the District Court for a new trial because of the alleged sufficiency of the evidence to support the verdict which was set aside.

On review of a conditional order granting defendant's motion for new trial in the alternative, the appellate court must always take the view that the determination of whether a new trial should be granted, as well as whether judgment should be entered, calls for judgment in the first instance of the trial judge who saw and heard the witnesses.

*Globe Liquor Co. v. San Roman,* 332 U. S. 571, 574 (1948);

*Montgomery Ward & Co. v. Duncan,* 311 U. S. 243 (1940).

Further, in an appeal from such an order, made as here under Rule 50(b) of the Federal Rules of Civil Procedure (28 U. S. C. A. 723(c) addendum), there is a clear distinction between the power of the trial court, after setting aside the verdict, to enter judgment notwithstanding the verdict on the one hand, and its power to grant a new trial on the other. Two different and entirely distinct rules govern the trial court's admitted discretion in these respects. As stated by this Circuit, the rule governing the trial court's power to render a judgment notwithstanding the verdict is phrased in the question

> "whether or not, under the applicable law, defendant has established the defense (that the insured made a misrepresentation of a material fact in his application) as a matter of law, and was therefore entitled to a directed verdict or to a judgment notwithstanding the verdict."
>
> *Mutual Life Ins. Co. of N. Y. v. Morairty,* 178 F. 2d 470, 473 (C. C. A. 9th, 1949).

New trials may be granted on a different basis, as is pointed out by Circuit Judge Parker in a leading case, *Garrison v. United States,* 62 F. 2d 41 (C. C. A. 4th, 1932), at page 42:

> "Verdict may be set aside and new trial granted, when the verdict is contrary to the clear weight of the evidence, or whenever in the exercise of a sound discretion the trial judge thinks this action necessary to prevent a miscarriage of justice."

Thus it is that an order granting a new trial because the verdict is contrary to the clear weight of the evidence will not be reversed on appeal.

*Montgomery Ward & Co. v. Duncan,* 311 U. S. 243, 251 (1940);

*Marsh v. Illinois Cent. R. Co.,* 175 F. 2d 498 (C. C. A. 5th, 1949);

*Childs v. Radzevich,* 139 F. 2d 374 (App. D. C. 1943);

*Hawkins v. Sims,* 137 F. 2d 66 (C. C. A. 4th, 1943);

*General American Life Ins. Co. v. Central Nat. Bank of Cleveland,* 136 F. 2d 821 (C. C. A. 6th, 1943);

*Rice v. Union Pac. R. Co.,* 82 Fed. Supp. 1002 (D. Neb. 1949);

*Pistolesi v. Mass. Mut L. Ins. Co.,* 64 Fed. Supp. 427 (N. D. Cal. 1945).

See also additional cases collected in:

Barron & Holtzoff, *Federal Practice and Procedure* (1950), pp. 778-779.

From the summary of the evidence presented hereinabove in appellee's statement of the case and argument thus far, it is evident that by every standard the verdict for plaintiff was contrary to the clear weight of the evidence. Consequently, even if the motion for new trial had been made in and of itself, and not in the alternative in connection with the motion for judgment notwithstanding the verdict, the trial court's order granting a new trial would necessarily be sustained.

But when, as in the case at bar, and as specifically sanctioned by Rule 50(b) of the Rules of Procedure, defendant moves for judgment notwithstanding the verdict and simultaneously moves for a new trial in the alternative, the trial court should decide both motions, making its order on the new trial motion conditional upon reversal of its decision on the motion for judgment notwithstanding the verdict.

> *Montgomery Ward & Co. v. Duncan,* 311 U. S. 243, 253 (1940);
>
> *General American L. Ins. Co. v. Central Nat. Bank of Cleveland,* 136 F. 2d 821 (C. C. A. 6th, 1943);
>
> *Moffett v. Arabian American Oil Co.,* 85 Fed. Supp. 174, 181 (S. D. N. Y. 1949);
>
> *Boulter v. Commercial Standard Ins. Co.,* 78 Fed. Supp. 895, 896 (N. D. Cal. 1948), rev'd on other grounds, 175 F. 2d 763;
>
> *Bopst v. Columbia Casualty Co.,* 37 Fed. Supp. 32, 35 (D. Md. 1941).

And when the trial court follows this "appropriate procedure" laid out by the Supreme Court in the *Montgomery Ward* case, as it did here, then on appeal from the order granting the judgment *non obstante veredicto* and from the order granting a new trial in the alternative, the trial court's disposition of the new trial motion is not reviewable because interlocutory. In the governing case, the Supreme Court has ruled as follows:

> "Should the trial judge enter judgment n.o.v. and, in the alternative, grant a new trial on any

of the grounds assigned therefor, his disposition of the motion for a new trial would not ordinarily be reviewable, and only his action in entering judgment would be ground of appeal. If the judgment were reversed, the case, on remand, would be governed by the trial judge's award of a new trial."

*Montgomery Ward & Co. v. Duncan,* 311 U. S. 243, 254 (1940);

*McIlvaine Patent Corp. v. Walgreen Co.,* 138 F. 2d 177, 180 (C. C. A. 7th, 1943);

*Binder v. Commercial Travelers Mut. Acc. Assn.,* 165 F. 2d 896, 902-903 (C. C. A. 2d, 1948).

Appellant's contention that the trial court's order granting a new trial in the alternative was improper because of the alleged sufficiency of plaintiff's evidence has been covered at great length heretofore in this brief where we have pointed out that uncontradicted evidence of material misrepresentations established the defense as a matter of law. We do, however, advert to appellant's attempts to distinguish the *Morairty* case, attempts which serve only to emphasize the eminent propriety of the trial court's reliance upon this case as a governing precedent in the Ninth Circuit.

*Appellant's Brief,* pp. 71-73;

*Mutual Life Ins. Co. of N. Y. v. Morairty,* 178 F. 2d 470 (C. C. A. 9th, 1949);

*Memorandum Opinion of District Court,* Tr. I, pp. 51-52.

Fundamentally there is and can be absolutely no distinction between the *Morairty* case and the case at bar with respect to the ultimate question of law involved in the misrepresentations contained in the application. Paraphrasing the language of that case, at page 473:

> "The principal question before us is whether or not, under the applicable California (there Arizona) law, appellee (there appellant) had established the defense (that the insured made a misrepresentation of a material fact in his application) as a matter of law, and was therefore entitled to a directed verdict or to a judgment notwithstanding the verdict."

Similarly, while the facts in the two cases are not, and indeed could not be, identical, nevertheless the distinctions which appellant seeks to draw are in any rational comparison what have been aptly termed "distinctions without a difference." As a matter of fact, detailed factual analysis of the two cases produces a summary which can lead only to the conclusion that the District Court in the case at bar decided as wisely and properly as did the Circuit Court in the *Morairty* case, as follows:

| | Morairty Case | Case at Bar |
|---|---|---|
| *osures:* | Had a cold 6 years before in Good Samaritan Hospital. Consulted Dr. Bank 6 years before. X-ray revealed diverticuli. | Had pneumonia 41 years before and had an acute cold 6 years before. Consulted Dr. Wolf, Ross-Loos Clinic. |
| *s; pre-tions l Conceal-n:* | Had ulcers 6 years before. Had consulted Dr. Fahlen 11 years before and was confined in Good Samaritan. (Diagnosis was ulcers but X-ray revealed only diverticuli and Dr. Fahlen did not remember whether he informed Morairty of ulcer diagnosis.) | 4 consultations with Dr. Murrin for fluttery heart, cardiac pain, discomfort across chest like heartburn, and cardiac aching toward left shoulder blade, all within 4 years prior to application. |
| | Consulted Dr. Woodman 10 years before. Symptoms, gas and pain in abdomen. Diagnosis, diverticuli. He was referred to Dr. Bank, and was suffering from a massive gastro-intestinal hemorrhage. | 3 consultations with Dr. Murrin for disorders in lungs, respiratory organs, including diagnosis of bronchitis. 2 consultations with Dr. Wolf and with Dr. Hershey for same symptoms and disorders. All these consultations within 4 years prior to application. |
| | 3 years before, suffered recurrence of bowel hemorrhage. Confined to St. Joseph's Hospital after consultation with Dr. Flynn. Blood transfusions. No | 3 consultations with Dr. Murrin, 2 with Dr. Wolf, and 1 with Dr. Baltimore, for disorders of stomach and abdominal organs. Diagnoses of acute enteritis, |

| Morairty Case | Case at Bar |
| --- | --- |
| diagnosis whether ulcers or diverticuli. | inflammation of bowel, g tro-intestinal ailment, ten tive chronic appendix, a white blood count tw normal. All within 4 ye prior to application. |
| | Between signing of ap cation and delivery of p icy, and contrary to rep sentations in Certificate Continued Health and C tract Acceptance, consul once with Dr. Hershey a once with Dr. Lloyd. severe and serious infect was indicated and the c dition was diagnosed subsiding acute appendi |
| | Contrary to representati the last time he consul a physician was *not* in 1 when he consulted Dr. W for a cold, but he consul physicians some 17 ti between 1942 and 1946. |
| | Similarly, the ailments a diseases which he had indicated were not disclo |

| | Morairty Case | Case at Bar |
|---|---|---|
| *riality 'eli- by ier:* | Uncontradicted evidence of Chief Actuary and Chief Medical Director that risk would not have been accepted had company been informed of true facts concerning Morairty's medical history as revealed by the evidence. | Uncontradicted evidence of Underwriter and Assistant Medical Director of the Company that application would not have been approved, policy would not have been issued, and policy would not have been delivered if Company had known of true facts concerning Parrish's medical history as revealed by the evidence. |
| *ledge e ed:* | He knew he had hemorrhages, saw the 3 doctors and was hospitalized, but he apparently did not know that he had any disease such as ulcers. He knew he had diverticuli. | He knew he had consulted the 5 doctors some 17 times. He knew he had and complained of the cardiac pains and symptoms indicated above, the lung and respiratory pains and symptoms, the stomach and abdominal organ pains and symptoms including acute enteritis and acute appendicitis. |
| *l ection Death:* | No causal connection between ulcers and diverticuli and gastro-intestinal disorders on the one hand, and death by cerebral concussion caused from a fall. | Definite causal connection between death by heart attack and the various heart pains and symptoms. |

From the above chart it is readily apparent that the misrepresentations and concealments in the case at bar were in any event equally as flagrant as those in the *Morairty* case. Additionally, however, and in contrast to the four undisclosed consultations in the *Morairty* case, there were some seventeen undisclosed consultations in the case at bar. In both cases the evidence of materiality and reliance was uncontradicted. Finally, while in the *Morairty* case there was no causal connection between misrepresented ailments and the death, unquestionably there *was* such a causal connection in the case at bar.

While appellant may contend that from a strictly medical point of view a gastro-intestinal hemorrhage is symptomatically more serious than a fluttery heart, cardiac pain, discomfort across chest like heartburn and cardiac aching toward the left shoulder blade; or acute enteritis, inflammation of the bowel, chronic and acute appendicitis, gastro-intestinal ailments and a twice-normal white blood count, this begs the question. The symptoms the insured suffered in the case at bar, and for which he sought medical consultation and treatment on some seventeen occasions, are all indications of disease, ailment and disorder and the insurance company was entitled to know about them in evaluating the risk.

Actually, and looking at the facts from the final or post-mortem point of view, the symptoms in the *Morairty* case did not ultimately affect the risk involved. The symptoms were of a gastro-intestinal nature and the death was caused by a cerebral concussion totally unconnected with the symptoms, whereas in the case at bar, the insured whose symptoms included heart and cardiac pains died of a heart attack.

It is therefore respectfully submitted that the District Court properly and in the due exercise of its discretion granted defendant's motion for new trial in the alternative, and its order in this regard is not reviewable.

## Conclusion.

In conclusion, Acacia Mutual respectfully submits that the District Court did not err in granting appellee's motion for judgment and to set aside the verdict and in the alternative for a new trial, nor did it err in denying appellant's motion for a directed verdict. In the trial of the action Acacia Mutual established as a matter of law and without any conflict in the evidence that the insured had misrepresented and concealed numerous material facts relating to consultations, treatments, and diagnoses of diseases, ailments and disorders which were specifically referred to in the application for insurance and in the Certificate of Continued Health and Contract Acceptance. Since there was and is no conflict in the evidence on any of these matters there was no question of fact for the determination of the jury, and accordingly, as a matter of law appellee's motion was properly granted, appellant's properly denied, and the District Court's judgment should be affirmed.

Respectfully submitted,

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